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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-169

WILLIAM STEVEN COOK, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

and

SUPPLEMENTAL BRIEF

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INDEX

PAGE

Table of Citations ii

Opinions Below 2

Jurisdiction 2

Additional Questions Presented 3

Supplemental Statement of the Case 3

Supplemental Reasons for Granting the Writ 4

1. The court below refused to follow this Court's decision in United States v. Jorn, 400 U. S. 470 (1971) 4

2. The court below ordered a wrong result by affirming the district court after dividing equally on rehearing en banc when the decision of its original panel had reversed the district court 4

3. The court below refused to follow this Court's decision in Bollenbach v. United States, 328 U. S. 750 (1946) 5

4. The court below failed to require a cautionary instruction regarding evidence that a co-conspirator had entered a plea of guilty in conflict with the decision of other courts of appeal on the same question 8

Supplemental Brief 9

Conclusion 9

Supplemental Appendix 11

TABLE OF CASES

PAGE

Bollenbach v. United States, 328 U. S. 750 (1946) 3, 5, 6, 8

Freije v. United States, 386 F. 2d 408 (1st Cir. 1967) .. 8

Gaynor v. United States, 247 F. 2d 583 (D. C. Cir. 1957) 8

Koolish v. United States, 340 F. 2d 513 (8th Cir. 1965) 8

Trussell v. United States, 278 F. 2d 478 (6th Cir. 1960) 8

United States v. Crosby, 294 F. 2d 928 (2nd Cir. 1961) 8

United States v. Harrell, 436 F. 2d 606 (5th Cir. 1970) 8

United States v. Jorn, 400 U. S. 470 (1971) 4, 5

United States v. Kahn, 381 F. 2d 824, 836-838 (7th Cir. 1967) 8

United States v. Lansdown, 460 F. 2d 164 (4th Cir. 1972) 5

United States v. Restaino, 369 F. 2d 544 (3rd Cir. 1966) 8

United States v. Walden, 448 F. 2d 925 (4th Cir. 1971) 2

United States v. Walden, 458 F. 2d 36 (4th Cir. 1972) 5

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

and

SUPPLEMENTAL BRIEF

The petitioner filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on July 31, 1972, pursuant to Rule 20 of the Rules of the Supreme Court of the United States. That petition sought review of the action of the court below in denying petitioner's double jeopardy claim by an equally divided court on rehearing *en banc*. That action has now become a final judgment by the decision of the United States Court of Appeals for the Fourth Circuit rendered on July 20, 1972. This decision created two additional questions.

Petitioner is filing herein a supplemental authority as a reason for granting the writ on the question of double jeopardy, and additionally is filing a supplemental brief in reply to the Brief for the United States in Opposition.

OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Fourth Circuit is reported *sub nom. United States v. Walden,* 448 F. 2d 925 (4th Cir. 1971), and appears as Appendix A to the Petition for a Writ of Certiorari. The judgment of the court of appeals rendered upon reconsideration on May 4, 1972, *en banc,* 458 F. 2d 36 (4th Cir. 1972), appears as Appendix B to the Petition for a Writ of Certiorari. The judgment of the United States Court of Appeals for the Fourth Circuit after remand to the original panel rendered on July 20, 1972, not yet reported, appears as Appendix C to the Petition for a Writ of Certiorari. Petitioner filed a Petition for Rehearing in the United States Court of Appeals for the Fourth Circuit on August 7, 1972. The Petition for Rehearing was denied on September 20, 1972, by the United States Court of Appeals for the Fourth Circuit, and that decision appears as Supplemental Appendix E hereto. The decision of the district court, rendered verbally in open court, appears as Appendix D to the Petition for a Writ of Certiorari.

JURISDICTION

The judgments of the United States Court of Appeals for the Fourth Circuit were entered on May 8, 1972, and July 20, 1972. A timely Petition for Rehearing was denied on September 20, 1972, and this Supplement to Petition for a Writ of Certiorari and Supplemental Brief was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

ADDITIONAL QUESTIONS PRESENTED

1. Was there manifest necessity for the trial judge, on his own motion, to declare a mistrial over petitioner's specific objection, and declaration that he was in jeopardy and could not be tried a second time if his right to have the first trial completed was disregarded?

2. Did the United States Court of Appeals for the Fourth Circuit order the wrong result when it affirmed the district court after dividing equally on rehearing *en banc* when its original panel had reversed the district court?

3. Did the court below refuse to follow this Court's decision in *Bollenbach v. United States,* 328 U. S. 750 (1946).

4. Did the court below err in failing to require a cautionary instruction regarding evidence that a co-conspirator had entered a plea of guilty contrary to the decisions of other courts of appeal on the same question?

SUPPLEMENTAL STATEMENT OF THE CASE

The original Statement of the Case is adopted in its entirety with this addition. The petitioner was one of eleven defendants tried together. All of the other defendants were charged with and convicted of bank burglary and conspiracy. The general scheme of the conspiracy was that the defendants planned and executed bank burglaries in the nighttime. These burglaries took place in seven different states. The banks burglarized were always small and located in rural areas. The center of the bank burglary conspiracy was Columbia, South Carolina. The testimony indicated that petitioner lived in Augusta, Georgia, about seventy miles from Columbia, South Carolina. He ran a legitimate business there and was a coin collector. It was the Government's testimony that on several occasions he bought coins from one or another of the bank burglars, but

that he paid full value for the coins including their value as rare coins. He was never told where the coins came from and had no connection with the burglary of banks.

The Government charged in Count XII of the indictment that on April 16, 1967, the petitioner Cook and two co-defendants, one of whom was the Government's chief witness, transported $7,500.00 worth of coins from Columbia, South Carolina, to Augusta, Georgia, in violation of Title 18, U. S. C. § 2314. It was this transaction that also formed the basis for the charges of conspiracy against the petitioner. The testimony was that Cook bought the coins in Augusta, Georgia, after the two co-defendants took them there, but that he did nothing to arrange or cause their transportation.

The petitioner Cook requested an instruction that he could not be convicted for causing or conspiring to transport stolen money from Columbia, South Carolina, to Augusta, Georgia, as charged merely on proof that he helped to dispose of the stolen money after the interstate transportation was concluded. The Court included language to this effect in its instructions but also charged the exact opposite without explanation.

During the course of the trial the Government elicted testimony from an indicted co-conspirator, Boland, that he had entered a plea of guilty to all thirteen counts of the indictment in this case. The Court gave no limiting or cautionary instruction regarding this testimony.

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

1. The court below refused to follow this Court's decision in United States v. Jorn, 400 U. S. 470 (1971).

2. The court below ordered a wrong result by affirming the district court after dividing equally on rehearing

en banc when the decision of its original panel had reversed the district court.

These two questions are fully dealt with in the Petition for a Writ of Certiorari. Petitioner would like to call to the Court's attention as additional authority *United States v. Lansdown,* 460 F. 2d 164 (4th Cir. 1972). In that case the United States Court of Appeals for the Fourth Circuit followed this Court's decision in *United States v. Jorn,* 400 U. S. 470 (1971), without citing its contrary decision in this case, *United States v. Walden,* 458 F. 2d 36 (4th Cir. 1972), which petitioner argues in his Petition for a Writ of Certiorari fails to follow this Court's decision in *Jorn, supra.*

3. **The court below refused to follow this Court's decision in Bollenbach v. United States, 328 U. S. 750 (1946).**

Count I of the indictment, which charged conspiracy, included this language which was pertinent to the petitioner:

> "(b) to transport in interstate commerce from the State of Alabama, Tennessee, Mississippi, Virginia, North Carolina, and Georgia, and other states, to South Carolina and from South Carolina to Augusta, Georgia, goods wares, merchandise, securities, and money of the value of $5,000.00 or more, knowing the same to have been stolen, converted, and taken by fraud, in violation of Section 2314, Title 18, United States Code."

This obviously concerns the same transaction as is charged in Count XII of the indictment. Count XII charged:

"THE GRAND JURY FURTHER CHARGES:

> "That on or about the 16th day of April, 1967, in the District of South Carolina, WILLIAM STEVEN COOK, RICHARD BRENT HOGAN and JACK CONNOR BOLAND did transport from Columbia, South Carolina, to Augusta, Georgia, stolen goods,

wares and merchandise, that is, money of the value in excess of approximately $7,500.00, and they then knew the said money to have been stolen and did cause said act to be done in violation of Sections 2314 and 2, Title 18, United States Code."

The petitioner was not charged or named in any other part of the indictment. The petitioner's defense to these charges was that he received the coins in question, but even if the jury found that he received them with knowledge that they had been stolen, he was not guilty as charged because he had done nothing more than merely receive them. Relying on *Bollenbach v. United States*, 328 U. S. 750 (1946), he requested the following charge:

"REFUSED: 'The defendant Cook could not properly be convicted for the offense of having transported or for having conspired to transport from Columbia, South Carolina, to Augusta, Georgia, stolen money in the value of $7,500.00 as charged in Count 12 merely on proof that he helped to dispose of the stolen money after the interstate transportation was concluded.' "

In instructing the jury on how to determine membership in a conspiracy, the Court charged:

"And no person can be convicted of any interstate transportation of stolen money or of conspiracy to transport stolen money in interstate commerce merely upon evidence that he received the money after it had been transported in interstate commerce."

"In this case only as to the first count, I charge you possession of property recently stolen, if not satisfactorily explained is ordinarily a circumstance which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"That is only in connection with the first count of the indictment which charges the general conspiracy,

and the first part of that count that I charged you that particular law.

"And possession in one State of property recently stolen in another State, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it to be stolen property, but also transported it, or caused it to be transported in interstate commerce.

"So it is for you to say whether or not it was satisfactorily explained, and if satisfactorily explained then it is not to be considered as a circumstance. Ordinarily, the same inference may be reasonably drawn from false explanation of possession of recently stolen property.

"The term "recently" is a relative term, and has no fixed meaning. Where the property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession. If you should find beyond a reasonable doubt from the evidence in the case that the property described in Count 1 of the indictment was stolen and was transported in interstate commerce as charged, and that while recently stolen the property was in the possession of those accused in that count, particularly, as to the first Roman numeral, and that the property was in the possession of the accused, the jury can be justified in drawing those facts that the goods were transported or caused to be transported in interstate commerce by the accused with knowledge that it was stolen in that count, particularly, as to the first Roman numeral, and that the property was in possession of the accused in the state from which it was stolen, the jury can be justified in drawing those facts inferentially that the goods were transported or caused to be transported in interstate commerce by

the accused with knowledge that it was stolen . . ."

The Court then charged the exact opposite proposition:

> "I charge you, however, that mere possession of stolen goods does not raise any presumption that they have in fact been transported in interstate or foreign commerce."

The court never gave any instruction in reference to Count XII. The effect of this was that petitioner's jury was not instructed to follow the principle of law enunciated by this Court in *Bollenbach v. United States*, 328 U. S. 750 (1946), and the United States Court of Appeals for the Fourth Circuit, by failing to address itself to this state of affairs either in petitioner's original appeal or in his Petition for Rehearing, has, in effect, declined to follow this Court's decision in *Bollenbach, supra*.

4. The court below failed to require a cautionary instruction regarding evidence that a co-conspirator had entered a plea of guilty in conflict with the decision of other courts of appeal on the same question.

The trial court admitted evidence of the co-defendant Boland's pre-trial plea of guilty to all the charges without any limiting instruction in violation of the rule followed in at least eight circuits. *United States v. Harrell*, 436 2d 606 (5th Cir. 1970). *Freije v. United States*, 386 F. 2d 408 (1st Cir. 1967). *United States v. Crosby*, 294 F. 2d 928 (2nd Cir. 1961). *United States v. Restaino*, 369 F. 2d 544 (3rd Cir. 1966). *Trussell v. United States*, 278 F. 2d 478 (6th Cir. 1960). *United States v. Kahn*, 381 F. 2d 824, 836-838 (7th Cir. 1967). *Koolish v. United States*, 340 F. 2d 513 (8th Cir. 1965). *Gaynor v. United States*, 247 F. 2d 583 (D. C. Cir. 1957).

By silence, the Fourth Circuit has approved the trial court's action in following a course held to be reversible

error by the eight circuits listed above. This places the Fourth Circuit in conflict with those circuits.

SUPPLEMENTAL BRIEF

The Brief for the United States in Opposition at page 1 states:

> "The order of the court of appeals *en banc* reversing the decision of the panel and remanding the case to it for disposition of other issues (Pet. App. B) is not reported."

As pointed out herein, that decision is reported at 458 F. 2d 36 (4th Cir. 1972).

The Government's Brief for the United States in Opposition says in its Statement at page 2:

> "After a second jury trial with others in the United States District Court for the District of South Carolina, petitioner was convicted of conspiring to burglarize banks, in violation of 18 U. S. C. 2314."

The petitioner was not charged with conspiracy to burglarize banks. He was charged with conspiracy to and causing the interstate transportation of stolen property, which is the act prohibited by Title 18, U. S. C. § 2314.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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October, 1972.

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,982

UNITED STATES OF AMERICA, APPELLEE,

versus

WILLIAM STEVEN COOK, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA.
ROBERT W. HEMPHILL, DISTRICT JUDGE

ORDER

After careful consideration, and with the concurrence of Judge Boreman and Judge Bryan, the petition for rehearing is denied.

/s/ J. BRAXTON CRAVEN, JR.,
United States Circuit Judge.